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No. 81-69

# In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND RICHARDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment was violated when a package mailed from abroad, and found after a concededly legal search to contain heroin, was reopened without a warrant after a controlled delivery in order to determine the amount and purity of the heroin.

2. Whether DEA agents were authorized to conduct the second search.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 638 F. 2d 765.

### JURISDICTION

The judgment of the court of appeals was entered on March 2, 1981. A petition for rehearing was denied on June 1, 1981. The petition for a writ of certiorari was filed on July 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to seven years' imprisonment, to be followed by a five-year special parole term.

1. In December 1977, petitioner, using a false name, secured a post office box at the Miami Springs, Florida, post office. On March 2, 1978, a parcel addressed to that post office box arrived from overseas at the Foreign Mail Center in New York City. The parcel bore a customs declaration stating that it contained Thai silk and uncut stones. A Customs agent making a routine inspection, opened the parcel and found ten cigarette packets. He opened one of the packets, found cigarettes, and passed the entire parcel on for further inspection because it contained a tobacco product. A second Customs officer opened two additional cigarette packages. Instead of cigarettes, each of these contained vials of a powder that was determined to be heroin. Neither the amount nor the purity of the heroin was determined in New York. The parcel and its contents were then reassembled and sent on to a postal inspector in Miami for a controlled delivery (Pet. App. 1a-2a).

Government agents delivered the parcel to the Miami Springs post office on March 13, and a notice of the package's arrival was placed in petitioner's box. At the same time, Drug Enforcement Agency agents began surveillance to determine who would claim the package (Pet. App. 2a).

Petitioner arrived at the post office soon thereafter, found the delivery notice, and asked for the package. Once he received the package, he left the building and walked to a parking lot behind the post office. At that point, the agents conducting the surveillance arrested petitioner as he entered his car. When the agents addressed him with the false name he had used to secure the post office box, petitioner responded with his correct name. After he was given *Miranda* warnings, petitioner claimed that he knew nothing about the package and that he was merely picking it up for someone else (Pet. App. 2a-3a). Petitioner was then taken to a nearby police station, where the DEA agents opened the package. Chemical analysis subsequently revealed that

the parcel contained 27.4 grams of 93% pure heroin hydrochloride, which, when cut for distribution on the street, would yield some 12,000 doses (*id.* at *ibid.*).

2. On appeal, petitioner did not challenge the examination of the package in New York. Moreover, he conceded that the package contained heroin and that the chain of government custody was maintained between New York and Miami Springs. Petitioner asserted, however, that the fruits of the search in Miami Springs—the quantity and purity of the heroin, important in proving intent to distribute—should have been suppressed because that search was conducted without a warrant in violation of the Fourth Amendment (Pet. App. 6a).

The court of appeals rejected this contention, holding that the Miami Springs search was an "extended border search" (*id.* at 13a) that required no warrant. The court noted that warrantless searches are undoubtedly permitted at the border (Pet. App. 9a, citing *United States* v. *Ramsey*, 431 U.S. 606 (1977)), and that "the myriad difficulties facing customs and immigration officials who are charged with the enforcement of smuggling and immigration laws" (Pet. App. 9a) permit warrantless searches of persons and things at certain points away from the border (Pet. App. 10a-11a). The court found no reason to distinguish mail from other objects (*id.* at 12a-13a, citing *United States* v. *Ramsey*, *supra*), and therefore concluded that mail can be searched without a warrant in the following circumstances (Pet. App. 14a):

> (a) when it is established by a preponderance of the evidence that the mail has crossed the border; (b) when it appears with reasonable certainty that the mail's contents have not been altered since it entered the United States and, (c) if the search occurs after delivery of the mail to the addressee, when the government agents who made the search had a reasonable suspicion of smuggling activity.

Since all of these requirements were met here, the court upheld the Miami Springs search (*id.* at 14a-15a).

Judge Gee concurred, but added that "where, as here, an undisputedly valid initial search has established the presence of contraband in a container and the container remains under uninterrupted supervision and surveillance until delivery, a second opening of the container after delivery does not seem to me a search at all" (Pet. App. 15a). Instead, Judge Gee said, "[w]here certain knowledge is present" of the contents of a package, those contents should be treated as if they were in plain view (*idid.*).

Judge Godbold dissented, saying that he "would draw a bright, sharp line between mail that remains undelivered in the hands of or under the control of the mail service and mail that has been delivered to the addressee. For sealed mail that has been delivered I would require the usual probable cause and exigent circumstances to support a warrantless search" (Pet. App. 17a). Judge Godbold rested this conclusion principally on the "essentially private nature" of sealed mail (*ibid.*; see *id.* at 18a).

Petitioner sought rehearing, claiming for the first time that the DEA agents lacked authority to make an "extended border search" (Pet. App. 21a). The panel majority rejected this claim and denied the petition for rehearing on the ground that petitioner had had "repeated opportunities to raise the issue of the statutory validity of the search" earlier and had presented "no exceptional circumstances" justifying his failure to do so (*id.* at 22a).

## ARGUMENT

1.a. Petitioner concedes (Pet. 14, Pet. App. 6a)—as he must, under *United States* v. *Ramsey, supra*—that the search in New York was legal. Similarly, petitioner does not deny (see Pet. 15), and the court of appeals' opinion makes clear, that between the time they resealed the package in

New York and the time they seized it from petitioner in Miami Springs, the agents ensured that the package was not reopened and that it remained in exactly the condition they had ascertained it to be in when they conducted the lawful search in New York. It is also clear that the seizure of the package in Miami Springs was lawful (see *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980); *United States* v. *Chadwick*, 433 U.S. 1, 10 (1977)), especially when the authorities could simply have refused to deliver the package to petitioner at all; under ancient principles, the government is "entitled to possession" of contraband (*Boyd* v. *United States*, 116 U.S. 616, 623-624 (1886)) and may seize what they know to be contraband without a warrant (see *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977), citing *Hester* v. *United States*, 265 U.S. 57 (1924)).

Under these circumstances, the second opening of the package simply did not invade petitioner's privacy. The agents merely reopened what they knew to be the same package they had previously examined. "[T]here was nothing wrongful about the Government's * * * examination of the[] contents to the extent that they had already been [lawfully] examined * * *." *Walter* v. *United States*, 447 U.S. 649, 656 (1980) (opinion of Stevens, J.); see *id.* at 661 (opinion of White, J.). It is true that the agents had, for law enforcement purposes, allowed petitioner to take possession of the package momentarily; but this could not have reestablished any privacy interest in the contents of the package, because the agents ensured that petitioner did not himself open the package, place anything in it, or in any other way affect its contents. If the agents had intercepted the parcel sent to petitioner and delivered to petitioner an entirely new parcel that they assembled, it could scarcely be contended that they would have to obtain a warrant before opening the new parcel; this case is no different, except that instead of assembling a new package the agents reassembled the package originally sent to petitioner.

Similarly, since the agents knew there was heroin in the parcel, and knew that the contents of the parcel had not been altered, there is—as Judge Gee pointed out—no reason to distinguish between this parcel and one which permitted the heroin to be seen in plain view. In both instances the authorities could know to a physical certainty that the parcel contained contraband. For essentially these reasons, the courts of appeals have consistently upheld searches conducted under the circumstances presented here. See *United States* v. *Bulgier*, 618 F. 2d 472 (7th Cir. 1980); *United States* v. *Andrews*, 618 F. 2d 646 (10th Cir. 1980), petition for cert. pending, No. 81-796.

Finally, because the parcel had moved across a border, petitioner's legitimate expectation of privacy in it was diminished. See *United States* v. *Ramsey, supra; United States* v. *Truong Dinh Hung*, 629 F. 2d 908, 917 (4th Cir. 1980). Since it was searched before he had altered its contents, petitioner had no greater expectation of privacy in it than he had when it entered the country, and that expectation could not defeat the government's power to search the parcel.

b. It cannot plausibly be contended that, once the agents lawfully reopened the parcel and took out the substance they knew from the New York search to be heroin, they had to obtain a warrant before assaying the heroin. If the agents had found the heroin in plain view, they surely would not have had to obtain a warrant before assaying it. The heroin was contraband that belonged to the government (see page 5, *supra*); the government had the power to dispose of it as it wished. Petitioner had no conceivable claim that his privacy was invaded by the discovery of the strength and purity of the heroin. This case is therefore unlike *Walter* v. *United States, supra*, where the government took an action—projecting a film—which Justice Stevens's opinion compared to the opening of a sealed letter. See 447 U.S. at 654-655.

2. Petitioner's contention that the DEA agents lacked the statutory authority to conduct the search in New York (Pet. 18-22) was not properly raised and may not be considered. Fed. R. Crim. P. 12(b)(3) requires motions to suppress evidence to be raised before trial. If that is not done, the suppression claim is waived unless "cause" is shown for the procedural default (Rule 12(f)), which has not been done here. This conclusion is reinforced by the failure to raise the claim on appeal until rehearing.

In any event, this contention is without merit. Under 21 U.S.C. 878, DEA agents may "execute and serve search warrants" and "make arrests." The power to conduct lawful warrantless searches is necessarily implicit in these powers; Congress would not have intended to deny DEA agents the power to seize contraband in plain view or to conduct a search incident to arrest or a warrantless search where because of exigent circumstances their safety might be endangered or evidence might be destroyed. Since the reopening of the package did not invade petitioner's privacy, it arguably was not a search at all. If it was a warrantless search, it was reasonably ancillary to the powers granted in 21 U.S.C. 878. See, *e.g.*, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 780 (1968).

Petitioner asserts, with some support from *United States* v. *Soto-Soto*, 598 F. 2d 545 (9th Cir. 1979), that only law enforcement agents specifically authorized to conduct searches in connection with the entry of people or objects into the United States may take advantage of the "border search" exception to the warrant requirement. But here, unlike *Soto-Soto*, the search that petitioner challenges was not conducted at the border, and we do not rely on the border search principle alone to justify the reopening of the package. Instead, the reopening was lawful because it did not invade petitioner's privacy interests. The first search, in

New York, was lawful because it involved a parcel entering the United States that was examined by Customs agents, but our defense of the search in issue here would be the same no matter how the first search was justified, so long as it was lawful. In *Soto-Soto*, by contrast, the border search rule was the sole justification for the search in issue. See 598 F. 2d 549.[1]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1]In addition, petitioner's argument—and the reasoning of the court of appeals in *Soto-Soto*—appear incorrectly to equate the question whether a search was authorized by statute with the question whether it complies with the Fourth Amendment. If a government agent acts within an express or implied grant of authority and does not transgress the Fourth Amendment by making an unreasonable search or seizure, his action is lawful. It is immaterial that the relevant Fourth Amendment principles might be commonly called the "border search exception" while the statutory grant of authority makes no reference to borders.

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